IMRAN ZAKARIA v. PP

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
GUNALAN MUNIANDY JCA
HASHIM HAMZAH JCA
[CRIMINAL APPEAL NO: P-05(M)-558-11-2018]
28 DECEMBER 2021

Abstract – *The trial judge in a drug trafficking case must not breach the rule against double presumptions, and in any case, in calling for the accused's defence, must indicate whether the accused is called to enter his defence on actual or presumed trafficking. Omitting to undertake this exercise is prejudicial to the accused, as the standards imposed by law on the defence in respect of actual and presumed trafficking is different. It follows that a conviction meted out in the circumstances may not be safe as would entitle the accused to be acquitted and discharged instead.*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused person found guilty and charged for trafficking in dangerous drugs – Sentenced to death – Trial judge made mere statement that prima facie case had been made out without intimation whether defence was called based on actual or presumed trafficking – Whether omission prejudiced accused – Whether trial judge applied double presumptions and made no finding that presumptions have been rebutted – Whether conviction and sentence safe – Dangerous Drugs Act 1952, ss. 39B(1)(a), 37(d) & 37(da)*

A raid carried out by the police on a house led to the discovery of dangerous drugs and chemical substances and equipment believed to be used to process drugs. The appellant, who was present at the house, was arrested and charged at the High Court, for trafficking in Heroin and Monoacetylmorphines weighing 548.17g, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') read together with s. 34 of the Penal Code (as the appellant was initially charged with another individual who was acquitted at the end of the *prima facie* stage). At the close of the defence case, the trial judge concluded that: (i) the appellant's DNA was found on the toothbrushes, face mask, plastic bottle and t-shirt found in the house, indicating that the appellant had been staying in the said house for quite some time to carry out drug-trafficking activities; (ii) the appellant had knowledge of the drugs and physical possession, custody and control over the drugs found. This finding was made without depending on the presumption under s. 37(d) of the DDA; and (iii) the appellant was carrying out an activity of trafficking of dangerous drugs, as defined under s. 2 of the DDA, as evidence showed actual trafficking, specifically 'manufacturing'. Satisfied that the prosecution had established a *prima facie* case, the trial judge called upon the appellant to enter his defence. The appellant's defence was, however, found to be one of bare

A denial; the appellant was found guilty, convicted for the offence and sentenced to death. Hence, the present appeal which centered around the application of double presumptions under ss. 37(d) and 37(da) of the DDA and there was no finding that the said presumptions have been rebutted. In support of the appeal, the appellant submitted that (i) the trial judge made a B mere statement that a *prima facie* case had been made out; (ii) there was no intimation whether defence was called based on actual or presumed trafficking; and (iii) this omission had prejudiced the appellant. While the prosecution argued there was no error in the trial judge's decision, it was, however, admitted that there was a typo error in para. 94 of the trial judge's C grounds of judgment where s. 37(d) of the DDA was mentioned without any intention to be invoked and the same had no significance nor relevance.

Held (allowing appeal)
Per Kamaludin Md Said JCA delivering the judgment of the court:

D **(1)** The appellant was facing a death sentence. It concerned his life or personal liberty under art. 5 of the Federal Constitution ('FC') and in violation of art. 8(1) of the FC, which guaranteed equal protection of the law. A decision or judgment handed down must have certainty and precision. When the words of s. 37(d) of the DDA were used more than once *ie* in paras. 54 and 94 of the grounds of judgment, it could be E inferred that (i) it was important and relevant. It clearly showed that the trial judge applied the said section in his decision as, otherwise, there was no reason or necessity to mention it in the judgment; and (ii) the finding of possession was based on presumption. (para 41)

F **(2)** Possession is not defined in the DDA. To constitute possession, it is necessary to establish that: (i) the person had knowledge of the drugs; and (ii) the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s. 37 of the DDA. Such invocation or mention of s. 37(d) of the G DDA showed that there appeared to be a real doubt whether the trial judge indeed relied on presumption of possession against the appellant or direct evidence at the end of the prosecution case or *prima facie* stage. The benefit of the doubt must, in law, be given to the appellant. More seriously, at para. 67 of the grounds of judgment, reference was also H made to s. 37(da) of the DDA. If the trial judge's mind had addressed the presumption under s. 37(d) of the DDA, reference to the presumption under s. 37(da) would make the finding to be based on double presumption which is not permitted in law. (paras 42 & 43)

I **(3)** The trial judge merely said that a *prima facie* case had been made out. The trial judge ought to indicate, at the *prima facie* stage, whether the appellant was called on direct or presumed trafficking. Without the intimation, the appellant did not know what standards he was expected

to meet and there laid the prejudice. The decision arrived at para. 94 *ie*, in invoking s. 37(d) of the DDA was quite confusing. The finding of possession was definitely based on presumption instead of direct evidence which must have been the case by also invoking ss. 2 and 37(da) of the DDA. There was no finding whether the presumptions have been rebutted. Having invoked these presumptions, it was incumbent that the trial judge ought to make a finding whether the said presumptions have been rebutted. (paras 48 & 52)

(4) The trial judge committed an obvious error. The conviction against the appellant was plainly wrong and not safe. The decision of the High Court, to convict the appellant and sentence him to death, was set aside. The appellant was acquitted and discharged. (para 53)

Case(s) referred to:

Caniete Robelyn Masterelo v. PP (Mahkamah Persekutuan Malaysia Rayuan Jenayah No: 05(M)-240-10 Tahun 2018 (B)) (Unreported) ***(refd)***
Mohamad Hanafi Mohamad Hashim lwn. PP [2016] 6 CLJ 378 CA ***(refd)***
Muhammad Lukman Mohamad v. PP [2020] 1 LNS 455 CA ***(refd)***
Ooi Hock Kheng v. PP [2014] 1 LNS 685 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Muhammad Nasir Shaharudin [1994] 2 MLJ 576 ***(refd)***
Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP [2014] 4 CLJ 406 CA ***(refd)***
Ugonna Philip Nwankwo v. PP [2016] 2 CLJ 247 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 180(4)
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2)
Federal Constitution, arts. 5, 8(1)
Penal Code, s. 34

For the appellant - Hisham Teh Poh Teik, Leong Xin Wen & Yong Jei Beng; M/s Teh Poh Teik & Co
For the respondent - Nurul Farhana Khalid; DPP

[Editor's note: Appeal from High Court, Pulau Pinang; Criminal Trial No. 45A-23-06-2016 (overruled).]

Reported by Najib Tamby

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] The appellant was convicted for trafficking in 548.17g of Monoacetylmorphines by the High Court of Penang and was sentenced to death. He was originally tried together with one Othman bin Ahmad ("second accused") as the charge was premised under s. 34 of the Penal Code. The second accused was acquitted at the end of the *prima facie* stage.

[2] The respondent did not appeal against the acquittal of the second accused.

[3] This appeal is only concerned with the appellant.

[4] In this appeal, the appellant's argument is confined to the errors of the learned Judicial Commissioner ("JC", now High Court Judge) in invoking both the s. 37(d) and s. 37(da) presumptions under the Dangerous Drugs Act 1952 to find that there was a *prima facie* case made out against the appellant and having invoked the presumptions, the learned JC did not make a finding whether the said presumptions have been rebutted. It was submitted that this was not done and the conviction cannot stand.

[5] We have considered the grounds raised by the appellant's counsel and the reply from the Deputy Public Prosecutor for the respondent. We have read the learned JC's grounds of judgment and the records of appeal. We are unanimous in finding that there is merit in the appellant's appeal that the learned JC has committed a serious error in his decision to convict the appellant. We are satisfied that the conviction is not safe. The High Court decision is set aside and the appellant is ordered to be acquitted and discharged.

[6] We give our grounds of decision.

The Charge

[7] The amended charge against the appellant and the second accused reads as follows:

> Bahawa kamu bersama-sama pada 28/11/2014, jam lebih kurang 10.20 pagi, di alamat No. 106, Lorong Rajawali 2, Sungai Ara, 11900 Pulau Pinang, di dalam Daerah Barat Daya, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu Heroin dan Monoacetylmorphines seberat 548.17 gram dan oleh itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s. 39B(2) Akta yang sama, dan dibaca bersama seksyen 34 Kanun Keseksaan.
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> Translation
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> That you together on 28.11.2014, at about 10.20 a.m., at the address of No. 106, Lorong Rajawali 2, Sungai Ara, 11900, Penang, in the District of Barat Daya, Penang, was trafficking in dangerous drugs i.e. Heroin and Monoacetylmorphines weighing 548.17 grams to wit you have committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 read together with section 34 of Penal Code.

Background Facts

[8] On 28 November 2014, at about 10.20am, SP7 (Insp Sherman Jackson Bosco) together with Insp Muhammad Amirullah led a team of police officers to the address stated in the charge. On arrival at the said address, they forced open the grille door of the house and managed to enter the house when the appellant opened the wooden door.

[9] SP7 conducted a body search on the appellant and did not find any unlawful items on the appellant. SP7 made an examination of the ground floor of the house and did not find any unlawful items there. SP7 then examined the top floor of the house witnessed by the appellant and his raiding team. As a result, SP7 found dangerous drugs as stated in the charge exposed on the floor at the guest area. SP7 also seized other case exhibits, ie, chemical substances and equipment believed to be used to process drugs inside the house. SP7 then arrested the appellant for further action.

[10] On the same day at about 10.45am, SP10 (Insp Mohd Azrin bin Abd Manan) arrested the second accused at the Road Transport Department, Penang.

[11] All the case exhibits and arrested person, ie, of the appellant were handed over to the investigating officer (SP11). The drug exhibit was sent to the Chemistry Department for analysis. The analysis was done by SP8 (Puan Siti Aishah bt Che Ani) and the result confirmed the drug exhibit seized by SP7 was Heroin and Monoacetylmorphines weighing 548.17g.

Finding At The End Of Prosecution's Case

[12] The High Court Judge was satisfied that the prosecution has successfully proved the drugs seized were dangerous drugs. The type of drugs and the weight of the drugs as stated in the charge were never disputed by the defence counsel. There was no challenge on the evidence and analysis done by the chemist (SP8) on the drugs exhibit. The evidence given by SP7 on the manner the drugs were found, handing over to SP11 until analysis done by SP8 were also not disputed by the defence counsel. In other words, the defence did not challenge the fact that there was no break in the chain of evidence from the time the drugs were discovered to the time that they were produced in court.

[13] Based on the evidence of prosecution's witnesses, the High Court Judge made a finding that the drugs, equipment and chemical substances found inside the house were under the custody and control of the appellant. During the arrest of the appellant, he was the only person inside the house and the drugs were found exposed at the guest area of the top floor. SP7 could smell strong smell inside the house and the smell could not pass through the house because all the windows were closed.

[14] The analysis done by SP8 on the cotton swab taken from the appellant showed it contained traces of Morphine and Monoacetylmorphine. The second cotton swab contained traces of caffeine. The High Court Judge made a finding that the appellant was dealing with the said drugs inside the house. The analysis done by DNA chemist (SP4), Puan Norazida bt Daud confirmed the finding of the appellant's DNA on the towel, plastic bottle, two toothbrushes, t-shirt, and face mask. The appellant had stayed in the said house for quite some time.

[15] The High Court Judge made a finding that the prosecution has proved that the appellant had knowledge of the drugs based on the evidence by SP7 who discovered the drugs on the top floor of the said house. Other items found were equipment used to process the drugs and chemical substances. SP6 and SP7 both confirmed that there was a strong sour smell inside the house. The High Court Judge concluded that the appellant had physical possession, custody and control over the drugs found, without depending on the presumption under s. 37(d) of the Dangerous Drugs Act 1952.

[16] The High Court Judge was satisfied that all the items seized from the said house clearly showed that the said house was used to manufacture drugs and the appellant was the only occupant of the said house when he was arrested. There was a large amount of chemical substances found and the chemist (SP8) had confirmed that the said house was used to process the drugs. The High Court Judge made a finding that the appellant was carrying on an activity of trafficking of dangerous drugs as defined under s. 2 of the Dangerous Drugs Act 1952. All the evidence shows actual trafficking, specifically "manufacturing" against the appellant.

[17] The High Court Judge made a finding that the appellant had possession and knowledge (physical possession) over the drugs based on presumption under s. 37(d). As for the element of trafficking of dangerous drugs, the High Court Judge invoked s. 2 of the Dangerous Drugs Act 1952, ie, when the raid and arrest were made, the appellant was processing and manufacturing the drugs mentioned in the charge. The prosecution has proved a *prima facie* case against the appellant and the appellant was called to enter his defence.

The Defence Case

[18] The appellant gave evidence on oath that he was staying at Mutiara Heights Apartment, Jelutong, Pulau Pinang. On 28 November 2014, at about 9.15am, Hamidyasir and SD2 (Mohd Fahmi) came to his house and asked the appellant to help them clean the house which Hamidyasir would continue renting and occupying. The appellant drove his car following Hamidyasir's car from his house to the said house. The said house was in a gated community housing project. The appellant stated that Hamidyasir informed SD3 (Jeganathan a/l Muthuvello – security guard) that Hamidyasir brought people in the appellant's car to clean the said house. When they entered the

said house, its condition was very dirty and smelly. Hamidyasir showed the appellant and SD2 the rooms on the ground floor and top floor. At the top floor, the appellant used the toilet where there were toothbrushes and face mask in the toilet.

[19] The appellant claimed that he and SD2 did not know that the items found in the said house were drugs and drug-processing equipment. Hamidyasir informed him that all the items were left behind by the previous tenant. The appellant noted that there was no washing equipment to clean the house except a bin and vacuum cleaner. The appellant asked Hamidyasir to buy the equipment, ie, broom, mop, brush, soap and etc. Hamidyasir agreed and asked the appellant to wait in the house. Hamidyasir asked SD2 to follow him to the nearby shop.

[20] The appellant gave evidence that at about 10.20am, he heard a loud bang at the front door. He was shocked and opened the wooden door. He saw a group of men wearing masks and pointing guns at him. They entered the house and introduced themselves as policemen. The appellant did not try to run away. He was arrested and was taken to the police station. SD2 corroborated the appellant's evidence that Hamidyasir and he went to the appellant's house and after that to Hamidyasir's rented house. Hamidyasir and he went out to buy cleaning equipment. However, SP12 could not confirm the presence of SD2 at the appellant's house. SP12 is the appellant's wife. SD3 who was on duty at the material time of the event gave evidence that he saw Hamidyasir entering the housing area using an access card. Hamidyasir asked permission from SD3 to allow the appellant to enter the area in his car. Later, he saw Hamidyasir exited the area with an unknown person sitting in the front seat of the car. Not long after that the police raided the house.

[21] The appellant's brother, SD4, gave evidence in support of the appellant's defence, *inter alia*, that Hamidyasir and SD2 went to the appellant's house to ask the appellant to clean the said house. SD4 was not at the said house and did not know what happened at the house and what the appellant was doing there.

Finding At The End Of Defence Case

[22] The High Court Judge made the finding that with the appellant's DNA found on the toothbrushes, face mask, plastic bottle and t-shirt it, showed that the appellant had been staying in the said house for quite sometime to carry out the activity of trafficking in dangerous drugs. The appellant's defence was a bare denial and the story was created mainly to deny the charge made against him. The appellant's defence that he was with Hamidyasir and SD2 before the arrest is mainly to show that he does not have the care and management of the said house. The High Court found that SD2's evidence did not support the appellant's defence because SD2 was not inside the said

house when the arrest took place. The evidence of SD3 was totally rejected by reason that he was not the security guard on duty on that particular day when the raid was made by SP7 and his team of policemen. There is no evidence produced, ie, daily entry book confirming he was on duty on the particular day. On SD4's evidence, the High Court Judge found it failed to rebut the prosecution's evidence and raise a reasonable doubt in the prosecution's case. Based on the evidence, the High Court Judge found the appellant had committed the offence charged and found him guilty for trafficking in dangerous drugs ie, Heroin and Monoacetylmorphines weighing 548.17g and sentenced him to death.

The Appeal

[23] At the outset, the appellant's counsel informed this court that he would not be disputing the whole findings of fact by the learned judge except on some grave errors in the pronouncement at the end of prosecution case which affect the defence case. The errors have purportedly caused prejudice and injustice to the appellant.

[24] In the written submission, the appellant canvassed the following grounds:

(i) the learned trial judge erred when His Lordship did not indicate in his *prima facie* ruling whether defence was called on actual trafficking or presumed trafficking;

(ii) that the learned trial judge erred when His Lordship breached s. 180(4) of the Criminal Procedure Code;

(iii) that the learned trial judge erred when he convicted the appellant on both presumed trafficking and actual trafficking;

(iv) that the learned trial judge had breached the rule against double presumptions; and

(v) that the learned trial judge erred when His Lordship did not rule at the end of the defence case whether the statutory presumptions had been rebutted.

[25] The argument is centred around the application of double presumptions under ss. 37(d) and 37(da) of the Dangerous Drugs Act 1952 and there is no finding whether the said presumptions have been rebutted.

[26] The notes of proceedings at p. 221 AR vol. 2B showed that the learned JC merely says that a *prima facie* case has been made out. It was argued that the *prima facie* ruling is a mere statement that a *prima facie* case has been made out. There was no intimation whether defence was called based on actual or presumed trafficking. This omission has prejudiced the appellant as the standards imposed by law on the defence in respect of actual and presumed trafficking is different.

[27] The procedure after conclusion of case for prosecution is found in s. 180(4) of the Criminal Procedure Code which says that a *prima facie* case is made out against the accused where the prosecution had adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. The appellant's counsel submitted that the learned JC invoked both the s. 37(d) and s. 37(da) presumptions to find that there was a *prima facie* case and that presumptions cannot amount to "credible evidence" contemplated under s. 180(4) of the Criminal Procedure Code.

[28] The appellant's contention is based on to the learned JC's grounds of judgment at *prima facie* case stage at p. 53 and p. 68 AR vol. 1. We produced paras. 65 and 66 at p. 53 and para. 94 at p. 68 as follows:

> At p. 53
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> [65] Berdasarkan fakta dalam kes ini terhadap OKT1 dan setelah memberi pertimbangan ke atas kesan menyeluruh dari cebisan-cebisan keterangan yang dikemukakan di dalam kes ini membawa kepada rumusan tunggal dan kesimpulan bahawa OKT1 mempunyai milikan dadah yang dijumpai di dalam rumah tersebut dan OKT1 sedang melakukan aktiviti pengedaran dadah sebagaimana yang ditafsirkan di bawah seksyen 2.
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> [66] Dari keseluruhan keterangan yang dikemukakan juga menunjukkan adanya actual trafficking secara spesifiknya di dalam kes ini adalah manufacturing. Dalam keadaan yang sama juga jumlah bagi berat dadah heroin dan monoacetylmorphines adalah sebanyak sebagaimana pertuduhan yang mana adalah melebihi jumlah anggapan di bawah s. 37(da) Akta Dadah Berbahaya.
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> At p. 68
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> [94] Atas alasan ini adalah menjadi keputusan saya bahawa OKT1 mempunyai milikan dan pengetahuan (milikan fizikal) ke atas dadah tersebut bergantung kepada anggapan di bawah seksyen 37(d). Manakala bagi intipati pengedaran dadah ke atas OKT1, saya menggunakan peruntukan di bawah seksyen 2 Akta 234 iaitu semasa serbuan dan tangkapan dibuat, OKT1 sedang memproses dan mengilang dadah sebagaimana pertuduhan.

[29] It was submitted that the learned JC invoked both direct and presumed trafficking and this is a serious error. The learned JC found a case of direct and presumed trafficking. In short, at p. 53, s. 2 and s. 37(da) were invoked. This inconsistent approach cannot be sustained in law. The appellant relies on *Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP* [2014] 4 CLJ 406; *Mohamad Hanafi Mohamad Hashim lwn. PP* [2016] 6 CLJ 378*;* [2016] 3 MLJ 723; and *Ugonna Philip Nwankwo v. PP* [2016] 2 CLJ 247. The cases show that there is breach of rule against double presumptions and this is a fundamental error which will vitiate the conviction.

[30] The appellant's counsel also submitted that the recent Federal Court case of *Caniete Robelyn Masterelo v. PP* (Mahkamah Persekutuan Malaysia Rayuan Jenayah No: 05(M)-240-10 Tahun 2018 (B)) had allowed his appeal based on the same grounds. The grounds of appeal were stated in the following manner:

(i) the learned trial judge erred when His Lordship did not indicate at the *prima facie* stage whether defence was called on direct or presumed trafficking; and

(ii) the learned trial judge erred when His Lordship invoked the presumption under s. 37(d) of the Act.

[31] There are no other grounds except those two grounds. The said appeal was taken as a point of law that there was no indication at the *prima facie* stage whether defence was called on direct evidence of trafficking or presumed trafficking. The court merely said that a *prima facie* case had been made out.

[32] The complaint of the appellant is this: because in trafficking charges under the DDA there are two different types of burden imposed on the accused depending whether it was a case of direct or presumed trafficking. If it was a case of direct trafficking the onus of the defence is to raise a reasonable doubt whilst if it was a case of presumed trafficking or if any of the presumptions are invoked then the defence has to rebut the presumption on a balance of probabilities. In the latter situation, the defence would probably have to call witnesses to meet that standard whilst in a case where the standard is that of a reasonable doubt the accused can generally take advantage of the infirmities in the case of the prosecution. Without the intimation, the appellant would not know what standards he was expected to meet, therein lies the prejudice. Had the High Court Judge undertaken a maximum evaluation the court would have no difficulty to inform the appellant what was the nature of trafficking or whether any presumption had been invoked.

[33] Having heard the argument, the Federal Court bench consisting of five Federal Court Judges allowed the appellant's appeal. However, there is no written judgment. The appellant counsel produced the order of the Federal Court dated 13 November 2019 ordering that the appeal be allowed and the conviction and death sentence meted out against the appellant by the High Court and affirmed by the Court of Appeal be set aside.

[34] Further, in the present appeal, the appellant's counsel submitted that the same ground applies that there is no finding whether the presumptions have been rebutted. Accordingly, this is another legal error ie, having invoked the presumptions it is incumbent that the learned JC ought to make a finding whether the said presumptions have been rebutted. This was not done and the conviction cannot stand. The appellant relies on *Ooi Hock Kheng v. PP* [2014] 1 LNS 685; [2014] 5 MLJ 585 and *Muhammad Lukman Mohamad v. PP* [2020] 1 LNS 455.

[35] Based on the above reasons, the appellant's counsel submitted that the conviction cannot be sustained and ought to be set aside.

[36] The respondent, on the other hand, submitted that there is no error in the learned JC's decision. According to the learned Deputy Public Prosecutor ("DPP"), if one reads the whole decision, the finding of *prima facie* case is based on direct trafficking. This is very clearly stated at para. 54 at p. 31 AR vol. 1.

> At p. 31:
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> [54] Sehubungan dengan dapatan saya di atas, saya membuat kesimpulan bahawa OKT1 mempunyai milikan, penjagaan dan kawalan ke atas dadah yang ditemui di dalam rumah tersebut secara fizikal tanpa bergantung kepada anggapan di bawah seksyen 37(d) Akta 234.

[37] The learned DPP submitted that the learned JC was satisfied that the prosecution's evidence falls under s. 2 of Act 234 which definition of trafficking includes "manufacturing". Based on the chemist (SP8)'s evidence on the large amount of chemical substances and equipment found inside the house and other items seized by SP7 and SP11, the appellant was the only person arrested inside the house and the appellant's DNA was found on the seized items, the learned JC made a finding of fact that the house was used as a place to process and manufacture drugs. The finding of the learned JC is at paras. 65 and 66 of his grounds at p. 53 shown above.

[38] With regards to para. 94 of his grounds of judgment, the learned DPP admitted that there is an error in para. 94 which, however, is a mere typo error. The correct reading is at para. 54 of the grounds of judgment. It was also contended that s. 37(d) of the Act is mentioned without any intention to be invoked or to create a confusion. It has no significance or is irrelevant.

[39] The learned DPP urged upon this court to reject the grounds raised by the appellant's counsel because as a whole, the prosecution has established the elements of direct trafficking against the appellant with which the learned JC agreed and was satisfied that a *prima facie* case had been made out against the appellant. Since the appellant was called to enter his defence on direct trafficking, the onus on the defence is to raise a reasonable doubt. It is not a case of presumed trafficking, therefore, the issue that the defence has to rebut the presumption on a balance of probabilities does not arise. The appellant has not been prejudiced.

Our Finding

[40] We have carefully considered the argument by the learned DPP on the alleged typo error in the judgment with regards whether to the words s. 37(d) mentioned in the judgment is insignificant or irrelevant.

[41] We did not agree with the learned DPP's submission. The appellant is facing a death sentence. It definitely concerns his life or personal liberty provided under art. 5 and violation of art. 8(1) of the Federal Constitution

which guarantees equal protection of the law. A decision or judgment handed down must have certainty and precision. In our view, when the words of s. 37(d) were used more than once ie, in para. 54 at p. 31 and in para. 94 at p. 68 of the grounds of judgment, it can be inferred that it is important and relevant. It clearly shows the learned JC has applied the said section in his decision as otherwise, there is no reason or necessity to mention it in the judgment. In our view, when s. 37(d) is mentioned not once but twice in the judgment, it can also be inferred that the finding of possession is based on presumption. The fact shows that the final decision is made in para. 94 at p. 61 of the judgment which comes later than para. 54 at p. 31 that the appellant has possession and knowledge of the drugs found based on s. 37(d) of Act 234. It is also the learned JC's decision that for element of trafficking, he applied s. 2, of the Act ie, during the raid and arrest, the appellant was in the act of processing and manufacturing drugs as mentioned in the charge.

[42] Possession is not defined in the DDA. To constitute possession, it is necessary to establish that: (i) the person had knowledge of the drugs; and (ii) the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s. 37 of the DDA. (See *PP v. Muhammad Nasir Shaharudin* [1994] 2 MLJ 576). In our view such invocation or mention of s. 37(d) in the judgment shows that there appears to be a real doubt whether the learned JC indeed relied on presumption of possession against the appellant or direct evidence at the end of prosecution case or *prima facie* stage. The benefit of the doubt must in law, be given to the appellant.

[43] More seriously, at para. 66 at p. 53, the judgment also refers to s. 37(da) of the Act. If the mind of the learned JC had addressed the presumption under s. 37(d), reference to the presumption under s. 37(da) would make the finding to be based on double presumption which is not permitted in law.

[44] The appellant's counsel also submitted that the learned JC having made the finding, made no indication at the *prima facie* stage whether defence was called on direct evidence of trafficking or presumed trafficking. The court merely said that a *prima facie* case had been made out. We agree with the appellant's counsel by reason that in trafficking charges under the DDA there are two different types of burden imposed on the accused depending whether it was a case of direct or presumed trafficking.

[45] If it was a case of direct trafficking the onus on the defence is to raise a reasonable doubt whilst if it was a case of presumed trafficking or if any of the presumptions are invoked then the defence has to rebut the presumption on a balance of probabilities.

[46] This principle has been explained in *Seyedalireza Seyedhedayatollah Ehteshamiardestani v. PP* [2014] 4 CLJ 406. In this case the appellant was charged for trafficking in 2,849g of Methamphetamine, an offence punishable under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). The appellant was found with a trolley bag ("P27") and a black bag ("P37") at the Kuala Lumpur International Airport. Upon examining the contents of P27, SP5 found a transparent plastic packet containing crystal-like substances suspected to be drugs concealed in P27. The trial judge made a finding that the appellant had custody and control of P27 at the end of the prosecution's case and went on to consider knowledge under the presumption of s. 37(d) of the DDA based on the appellant's suspicious conduct. The trial judge found that since the appellant had travelled from Doha to KLIA carrying and transporting the two packets of drugs which were concealed in P27, it envisaged the act of trafficking as in s. 2 of the DDA. Since knowledge had been proven by direct evidence, the trial judge held that the presumption of trafficking could be invoked under s. 37(da) of the DDA. Having found that the prosecution had established a *prima facie* case against the appellant, the trial judge called upon the appellant to enter his defence. Tengku Maimun Tuan Mat JCA (now CJ) held that:

> (2) The trial judge had invoked both presumptions under s. 37(d) and (da) of the DDA in the alternative. The trial judge must make a finding as to which presumption was relied upon as there had to be a certainty as to the presumption before the defence was called. If the trial judge had resorted to the presumption in calling the defence, the law required that the trial judge applied the test of balance of probabilities in considering whether the appellant had rebutted the presumption. There was no application of the test of balance of probabilities by the trial judge. (paras 19 & 20)
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> (3) The approach of not electing or making a finding on which presumption was invoked but merely relying on the alternative was most undesirable. The trial judge ought to make the necessary finding of whether there was actual or presumed possession and whether it was presumed or actual trafficking. It reflected the uncertainty of the part of the trial judge. Such finding was important as it impacted the burden placed on the defence. The failure of the trial judge to make a finding as to which presumption was relied upon for possession and trafficking and the failure to consider whether the appellant had rebutted the presumption amounted to a misdirection by way of non-direction which had prejudiced the appellant. (paras 21 & 23)

[47] In another case of *Ugonna Philip Nwankwo v. PP* [2016] 2 CLJ 247, the trial judge found that the prosecution had proved its case beyond reasonable doubt and thereby convicted and sentenced the appellant to death. On appeal, the appellant contended, *inter alia*, that (i) the trial judge had erred in failing to make a definite finding as regards to the second charge ie, (a) whether it was a case of deemed possession under s. 37(d) of the Act read with the acts

of trafficking under s. 2 of the Act; or (b) whether it was case of actual possession read with the trafficking presumption under s. 37(da) of the Act; (ii) the trial judge erred in failing to rule whether s. 37(da) presumption had been rebutted; and (iii) Moses and Sani Wahab were not called by the prosecution and not offered to the defence. In allowing the appeal; setting aside conviction and sentence of the High Court, Tengku Maimun Tuan Mat JCA (now CJ) held that:

> (1) Reading the grounds of judgment as a whole, there was a doubt whether the *prima facie* case on the second charge was premised on presumed possession under s. 37(d) of the Act and trafficking under s. 2 of the Act or whether it was on actual possession and presumed trafficking under s. 37(da) of the Act. The approach of the trial judge in merely relying on the alternative without electing or making a finding whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence amounted to a misdirection. (paras 25 & 27).
>
> (2) As for the first charge, the trial judge had invoked the presumption of trafficking under s. 37(da) of the Act. However, nowhere in the grounds of judgment of the trial judge did Her Ladyship made a finding of possession. Apart from the failure of the trial judge to make an affirmative finding of possession in respect of the first charge, Her Ladyship had also failed to make a finding of whether the appellant had rebutted the presumption of trafficking under s. 37(da). This omission was a material misdirection warranting appellate intervention. (paras 28 & 30).

[48] The appellant's counsel submitted that the learned JC erred when he did not indicate at the *prima facie* stage whether the appellant's defence was called on direct or presumed trafficking. We agree with him. The notes of proceeding at p. 221 AR vol. 2B merely says that a *prima facie* case has been made out. In our view, the learned JC ought to indicate at the *prima facie* stage whether the appellant was called on direct or presumed trafficking. Without the intimation, the appellant did not know what standards he was expected to meet, there lies the prejudice. We found the decision arrived at para. 94 ie, in invoking s. 37(d) quite confusing. The finding of possession is definitely based on presumption instead of direct evidence which must have been the case by also invoking s. 2 and s. 37(da).

[49] In *PP v. Chia Leong Foo* [2000] 4 CLJ 649 the court said:

> Presumptions are therefore restricted in their operation to instances where there is evidence only of the basic facts. The limitation on the use of the presumption provisions in the face of available evidence can be discerned if the ramifications of their use in such circumstances are considered. It must first be observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused. This is because where the court relies to a statutory provision relating to a presumption of law like the presumption provisions it is bound to take the fact as proved until evidence to the

contrary is given, on a balance of probabilities, to disprove it (see *PP v. Yuvaraj* [1969] 2 MLJ 89; *Nagappan Kuppusamy v. PP* [1988] 2 MLJ 53). This results in a legal burden being imposed on an accused person though it is not illegal. Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State v. Mello & Anor* [1999] 1 LRC 215). However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. Thus, indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed.

[50] In our view, the decision in invoking s. 37(d) had prejudiced the appellant. Had it been a case of *mens rea* possession and trafficking the appellant would have met the threshold of raising a reasonable doubt in her defence. In *PP v. Chia Leong Foo* (*supra*), it was also held that:

Arbitrary use of the presumption provisions, without any fixed guidelines, when there is direct evidence of the facts to be presumed may also prejudice the accused in another way. When the presumption provisions are invoked in one case and not in another although there is direct evidence of the facts to be presumed in both instances there may be a violation of art. 8(1) of the Federal Constitution which guarantees equal protection of the law. It has been held that the guarantee of equal protection applies against substantive as well as procedural laws (see *Lachmandas v. State of Bombay* [1952] SCR 710; *State of WB v. Anwar Ali* [1952] SCR 284; *Kewal Singh v. Lajwanti* AIR 1980 SC 161; *Chandra Bhawan v. State of Mysore* [1969] II SCWR 750). From the standpoint of the latter it means that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence without discrimination (see *Shorter Constitution of India* by D G Basu 12 Ed. P. 51). It follows that where there is direct evidence of a fact to be presumed the presumption cannot be invoked on the basis of a discretion. The rule must be applied equally to all cases that fall within the same class so that there is no discrimination in the manner of conducting the defence. That would amount to a reasonable classification for the purpose of art. 8(1) of the Federal Constitution. I am therefore of the view that the presumption provisions become inapplicable when there is evidence of the very fact to be presumed. They must be invoked when there is no such evidence or when the available evidence is not safe or satisfactory to be relied upon. The mandatory nature of the presumption provisions must therefore be read in that light to mean that where there is evidence only of the basic facts the presumed facts must be deemed to exist unless the contrary is proved. I pause to add that it is the interest of the accused that compelled Rubin JC (as he then was) to say in *PP v. Okonkwo & Anor* [1993]

A 3 SLR 610 that the intention of the prosecution to rely on a presumption must be intimated to the defence to enable the preparation of an appropriate line of cross-examination. This may be done by the prosecution in its opening address.

[51] At the defence case, the learned JC stated that the defence ought to B produce evidence to rebut the prosecution's case for the purpose of raising a reasonable doubt. Having analysed the defence evidence, the learned JC decided that the defence had failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted for trafficking in dangerous drugs under s. 39B(1)(a) of Act 234 and sentenced under s. 39B(2) of the Act.

C **[52]** We have alluded to earlier that the decision made in para. 94 of the judgment at the end of prosecution case is one of presumed trafficking by invoking s. 37(d) of the Act. Based on the said decision, we agree that there is no finding whether the presumptions have been rebutted. It is our considered view that this is another legal error ie, having invoked the D presumptions it is incumbent that the learned JC ought to make a finding whether the said presumptions have been rebutted. This was not done and in our view the conviction cannot stand. In *Ooi Hock Kheng v. PP* [2014] 1 LNS 685; [2014] 5 MLJ 585, Azahar Mohamed JCA (now CJM) held that:

> [12] There is another reason why we had allowed this appeal. At the E conclusion of the case for the prosecution, the learned JC had invoked s. 37(d) of the DDA to prove possession of the appellant of the Ketamine in the plastic bag. *The statutory presumption of possession under s. 37(d) is a rebuttable presumption. For this reason, it is incumbent on the learned JC to consider at the end of the whole case whether the presumption that he invoked had been rebutted on a balance of probabilities. A reading of the judgment of the learned JC* F *shows that he had failed to direct his mind on this point. This is a serious misdirection as the law requires the learned JC to make such a finding when he resorted to the presumption under s. 37(d) of the DDA* (see *Alcontara a/l Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705; [1996] 1 MLJ 209, *Tan Boon Kean v. Public Prosecutor* [1995] 4 CLJ 456; [1995] 3 MLJ 514 and *Public Prosecutor v. Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113).
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> G (emphasis added)

Conclusion

[53] Based on aforesaid reasons, we find there is merit in the appellant's appeal. We are satisfied that the learned JC has committed an obvious error H in his decision. It is our unanimous decision that the conviction against the appellant is plainly wrong and not safe. The appeal is allowed. The decision by the High Court to convict the appellant and sentence him to death is set aside. The appellant is acquitted and discharged.

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